(1)

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Bruce A. Friedemann, *Petitioner*

v.

Terri McCormick, Guadalupe Gutierrez, Joan Gilbert, Lucy Brajevich, Kathleen Assar, Michael Engs, Joe Torro, Margret Sprague, J. Grahm Smart, Pima Community College District Board of Governors, *Respondents.*

On Petition for a Writ of Certiorari to the 9th Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

In 42 U.S.C. § 1983/14th Amendment discrimination complaint, was summary judgment — denying straight-A nursing student (Friedemann) a jury trial — proper where solid, circumstantial evidence obtained through "discovery" or scientific research shows:

1. Malicious, incompetent teachers and staff flunked Friedemann for turning in a superb but heretical "process recording" (PR);

2. If not for the PR Friedemann would have received a B for Nursing 101;

3. The subjectively graded PR allows for arbitrary and capricious flunking of students the faculty dislikes;

4. Students hated Friedemann; teachers were afraid of Friedemann and thought he was mentally ill;

5. Friedemann was the first person *in ten years* who flunked Nursing 101 because of an "unsatisfactory" PR?

TABLE OF CONTENTS

Question Presented i
Jurisdiction: 28 USC § 1254(1) iii
Constitutional & Statutory Provisions: 14th Amendment, 42 USC § 1983 iii
Facts of the Case 1
Reasons for Granting Petition 7
Conclusion 7
Appendix 8a

TABLE OF AUTHORITIES

Alcman Services Corp. v. Samuel H. Bullock, P.C., 925 F.Supp. 252 (D.N.J.1996). 4
Clements v. Nassau County, 835 F.2d 1000 (2nd Cir. 1987). 4
Dawn v. Sterling Drug, Inc., 319 F.Supp.358 (D.C.Cal.1970). 4
Hines v. Rinker, 667 F2d 699, 701n.4 (1981). 5
Manok v. Southeast Dist. Bowling Ass'n, 306 F.Supp. 1215 (D.C.Cal.1969). 4
Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct 507 (1985). 5,6,7
Rossomando v. Bd. of Regents of Univ. of Nebraska, 2 F.Supp.2d 1223 (D.Neb. 1988). 4
Tenbrink v. Federal Home Loan Bank, 920 F.Supp. 1156 (D.Kan.1996). 5
Van De Zilver v. Rutgers University, 971 F.Supp 925 (D.N.J. 1997). 4
42 U.S.C § 1983 4

PETITION FOR A WRIT OF CERTIORARI

Bruce A. Friedemann respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS/JUDGMENTS BELOW

The Order denying Friedemann's Petition for Rehearing, en banc was denied on November 17, 2000 (8a); Friedemann's Petition for Review (unpublished) was denied on July 13,

2000 (8a); Friedemann's "Motion for a Rehearing — To Amend Summary Judgment" was denied on September 27, 1999 (9a); Friedemann's Complaint was summarily dismissed on September 7, 1999 (9a).

JURISDICTION

This Court has jurisdiction under 28 USC § 1254(1). (En banc appeal review denied 11/17/00.)

CONSTITUTIONAL & STATUTORY PROVISIONS

42 USC § 1983: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper procedure for redress.

14th Amendment: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

THE FACTS OF THE CASE

Petitioner, Bruce A. Friedemann, was a straight-A student at Pima Community College (PCC) [D92-G1*].

In the Spring of 1996, Friedemann enrolled in NRS (Nursing) 101 at PCC (an 8-credit-hour course). Friedemann scored a final grade of "B" on all of the NRS 101 tests [D92-G3]; yet Friedemann received a final grade of "F" for NRS 101 [D92-G1]!

The ultimate reason, the defendants allege, for flunking Friedemann was one "unsatisfactory" process recording (PR)[1]. [D92-M1-¶2.0]. Friedemann alleges:

1. The PRs [D92-PR1 & PR2, included in EOR*] are genius level and show that Friedemann developed a "superb therapeutic alliance" with the client [D25,p2,last¶].
2. The PRs say, essentially, 2 + 2 = 4 — the defendants say 2 + 2 = 5 [D91,p2,¶1].
3. A jury (Friedemann asked for a jury) can see that Defendant McCormick, the teacher who flunked Friedemann, offered no legitimate, professional criticism of Friedemann's PRs [D92,pp2-3; D91,pp2-3; included in EOR].

The evidence that the PRs are "genius level, superb" is offered in Friedemann's **massive,** 147-page book entitled, "The Cure Yourself of Asthma Book." This book, that

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* D92 refers to Docket 92 of the trial court record. EOR = Court of Appeals Excerpts of Record.

[1] "The goal of writing a process recording is to help you consciously and deliberately utilize therapeutic techniques in communication which will assist you to effectively provide psychological comfort for your clients" (School syllabus, D92-PR5,p47,¶1; in EOR). The PR is supposed to be a transcript of a "3- to 5-minute segment of a conversation that you *feel is significant*" (Syllabus at page 48, italics in original). Most students make up fictitious conversations or embellish ones they had; then the student is to indicate what "therapeutic techniques" they used in the conversation and "evaluate the effectiveness of your responses" (Syllabus, ibid.).

Students are required to do two PRs; Friedemann's first PR was "satisfactory" [D92-PR3]. The PR accounts for only a tiny part of the NRS 101 grade: The unit exams, for which Friedemann received a "B" account for 70% of the grade; the skills lab, which Friedemann passed, is 10% and; clinical lab, for which the PR is only a tiny part of, is worth 20% [D92-G7]. Less than .5 percent of class-time is spent discussing PRs, yet with one "unsatisfactory" PR, a student can flunk the entire 8-credit-hour class [D25,p2,last¶]!

Friedemann edited, contains over 200 abstracts of scientific reports proving that the science in Friedemann's PRs is excellent. In addition to the abstracts, Friedemann's book has more than 20 full text reports from scientific journals . Two of the reports were written by nurses and one of the professional, peer reviewed reports is exactly like Friedemann's.[2]

After the grade of "F" was entered by defendants McCormick and Gutierrez, Friedemann appealed his grade to defendants Gilbert, Brajevich, Assar, Engs, Torro, Sprague and Smart. (Defendant Pima Community College Board of Governors is respondent superior.) These defendants unprofessionally ignored the facts or, they were incompetent to discern the facts when they upheld the grade. Friedemann submitted to each of the defendants (except Gutierrez) many scientific reports and articles about "therapeutic technique" and psychosomatic asthma [D92-M1, PR7 & PR8]. These defendants and a jury could compare Friedemann's PRs to the example PRs in the student syllabi (D92-PR5 & PR6; in EOR) and see that Friedemann's PRs far exceed the academic norm.[3]

According to the affidavit of defendant Gilbert, who taught at PCC for 10 years: ***Friedemann is the only student that flunked NRS 101 because of an "unsatisfactory" process recording!*** [D99-B,¶¶ 8&24] (This is a "deviation from the academic norm.")

Defendants McCormick, Gilbert and Gutierrez thought Friedemann was mentally ill [D92-G2, ¶¶1&3; X-3]. McCormick and Gilbert were afraid of Friedemann [D92-X3]. Discovery evidence showed that on three separate occasions, defendants Assar, Gilbert and McCormick called the campus police on Friedemann but they did not "press

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[2] Friedemann intended to introduce *The Cure Yourself of Asthma Book* as evidence at trial. Excerpts from this book were offered as evidence during Friedemann's administrative, academic/discrimination appeals prior to this lawsuit and were included in Plaintiff's "Separate Statement of Facts & Evidence." [D25-M1 & D92-TCYOAB]

[3] The "academic norms" are the two sample PRs from the student syllabi [D92-PR5 & PR6]

charges" or initiate disciplinary review. Friedemann disliked defendants McCormick, Gutierrez, Gilbert and Brajevich *and they knew he disliked them* [D92-M1A,p3; G2,p2; X2], [D91,¶¶8-10]! Friedemann was disliked by students in NRS 101 [D92-X1]. Thus, there is evidence for a jury to see McCormick, Gilbert, Gutierrez and Brajevich had ulterior motives for flunking Friedemann.

Friedemann sought money damages based on an amount he would have earned as a nurse.

Questions in the Court of Appeals. Friedemann raised the following issues in the Court of Appeals:

1. Judge Roll, the District Court Judge, abused his discretion by dismissing Friedemann's complaint.

2. Roll, in his Sept. 7 ORDER, weighs the evidence, determines the credibility of witnesses and essentially took the place of a jury, which is contrary to the law![4]

3. Friedemann is entitled to have a jury (not the judge) decide the following material issues of fact:

a. Was Friedemann arbitrarily and capriciously discriminated against?

b. Are Friedemann's PRs "satisfactory"? (If the jury finds the PRs are "satisfactory" then there was no academic reason for the defendants to flunk Friedemann.)

c. Did the defendants exercise professional judgment when they flunked Friedemann?

d. Did Defendants McCormick, Gutierrez and Gilbert flunk Friedemann because they thought Friedemann was mentally ill?

e. Do teachers at PCC have autocratic authority to teach 2 + 2 = 5, the sun revolves around a flat earth, man did not evolve from monkeys, asthma is psychosomatic, silicon

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[4] For instance, Roll weighs heavily in favor of defendant Gilbert's affidavit but Gilbert's credibility is damaged when she stated, "In over 30 years of nursing practice and teaching I have evaluated over 1000 process recordings.... Mr. Friedemann's re-written process recording for Terri McCormick was equal to the worst process recording I have been called upon to review." [D99-B,¶¶16-17] A jury can tell that Gilbert's statement is hyperbole by examining Friedemann's PR and comparing it the examples in the syllabi [D92-PR5,p47ff; PR6,p62ff; in EOR] and see that Friedemann's PRs are far better.

breast implants cause auto-immune (psychosomatic) disease, smoking cigarettes does not cause cancer, if you're "mentally ill" you're "not competent" to stand trial and flunk students who disagree?

f. Was there a rational basis for flunking Friedemann?

g. Do the grading policies for NRS 101, regarding the subjective, vague requirements for PRs [D92-PR5,pp47-48; PR6,pp62-63; in EOR] allow for arbitrary and capricious discrimination?

h. Did the defendants McCormick and Gutierrez deviate from academic norms when they flunked Friedemann?

Summary judgment against Friedemann was not proper. To defeat a summary judgment of a §1983 claim, plaintiff must prove with solid circumstantial evidence that the defendants had no rational basis for their decision (they were irrational); that their decision deviated from the academic norm, was motivated by bad faith or ill will or, that the defendants did not exercise professional judgment (they were incompetent). *Clements v. Nassau County,* 835 F.2d 1000 (2nd Cir. 1987); *Van De Zilver v. Rutgers University,* 971 F.Supp 925 (D.N.J. 1997); *Rossomando v. Bd. of Regents of Univ. of Nebraska,* 2 F.Supp.2d 1223 (D.Neb. 1988).

When the "state of mind" of the malicious, incompetent teachers is at issue, "summary judgment is unwarranted where solid circumstantial evidence exists to prove plaintiff's case." *Clements v. Nassau County,* 835 F2d 1000 (2nd Cir. 1987).

"Summary judgment procedure should be used sparingly so that no plaintiff having scintilla of merit to his cause should be denied his day in court." *Manok v. Southeast Dist. Bowling Ass'n,* D.C.Cal.1969, 306 F.Supp. 1215. See also, *Dawn v. Sterling Drug, Inc.,* D.C.Cal.1970, 319 F.Supp.358.

> It is not role of judge at summary judgment stage to weigh evidence or to evaluate its credibility, but rather to determine whether there is genuine issue for trial; in so doing, court must draw all inferences in light most favorable to non-moving party, and where non-moving party's evidence contradicts movant's, court must accept non-movant's version as true. *Alcman Services Corp. v.*

Samuel H. Bullock, P.C., D.N.J.1996, 925 F.Supp. 252, affirmed F.3rd 185.

Summary judgment is not chance for court to act as a jury and determine witness credibility, weigh evidence, or decide upon competing inferences. *Tenbrink v. Federal Home Loan Bank,* D.Kan.1996, 920 F.Supp. 1156.

Deviation from academic norms. According to *Hines v. Rinker,* 667 F2d 699, 701n.4 (1981), at the University of South Dakota School of Medicine, "failure in one category alone would not result in an F if the points given in other areas were high enough." And, according to *Regents of the U. of Michigan v. Ewing,* 106 S.Ct 507, the school of medicine at the University of Michigan considers the student's "entire academic career" before flunking the student. Thus, the defendants, by ignoring Friedemann's entire academic career, substantially deviated from the academic norms when they flunked Friedemann.

The evidence is overwhelming that the PRs are superb. If a jury/judge can decide the mental competency of a criminal and whether silicon breast implants can cause auto-immune (psychosomatic) disease, the jury/judge can surely tell if Friedemann's PR is better than the examples in the syllabi [D92-PR5 & PR6; in EOR] and is on par with the professionals cited in Friedemann's *The Cure Yourself of Asthma Book*.

District Court Proceedings. The District Court Judge abused his discretion by:

1. Denying plaintiff a jury trial.
2. Weighing the evidence.
3. Ignoring evidence.

a. School policy allows defendants to arbitrarily, maliciously and capriciously flunk straight-A students, under color of law.

b. Defendants were incompetent and did not exercise professional judgment when they flunked straight-A student for turning in superb process recording.

c. The defendants deviated from academic norm when they flunked straight-A student for turning in superb pro-

cess recording.

d. Some of the defendants were afraid of plaintiff; some thought he was mentally ill and some were motivated by ill will when they flunked plaintiff for turning in a superb PR.

e. A jury can see there was nothing wrong with plaintiff's PR — that the defendants were motivated by ill will or were incompetent and did not exercise professional judgment when they flunked straight-A student.

Roll cites *Ewing* (474 U.S. 214) as the basis for dismissing Friedemann's Complaint, yet *Ewing* is dissimilar from Friedemann because Ewing had an "unenviable academic record" (at 227) and "received the lowest score recorded by an Interflex student in the brief history of that program." (at 216) whereas Friedemann was a straight-A student who would have received a B in NRS if not for the "unsatisfactory" PR.

Roll, citing *Ewing*, wrote:

> Federal courts are not the proper place to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." Id. at 226 (citation omitted).

Yet federal courts allow juries to evaluate cumulative, scientific evidence in cases involving asbestos, silicone breast implants, disease caused by tobacco, evolution.

It doesn't take an expert to see that Friedemann's PR is superb and there was no academic reason to flunk Friedemann. The jury could compare Friedemann's PR to the sample PRs in the syllabus [D92/PR5 and PR6] or the professional reports in journals [D92/TCYOAB] and see there was no academic reason for flunking Friedemann.

Court of Appeals Decision. The Court of Appeals, relying entirely on page 225 of *Ewing*, and being afraid to rule against the Supreme Court in *Ewing*, denied Friedemann's appeal: "The district court properly granted summary judgment in favor of the defendants because the record does not compel the conclusion that the defendants

acted arbitrarily in their academic decision. *See Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 225 (1985)."

The Court of Appeals ignored the evidence too — denying Friedemann his "day in court" *before a jury*.

REASONS FOR GRANTING THE PETITION

If the decision of the lower court is allowed to stand:

1. Schools in America could flunk and suppress heretics and punish students they hate, fear and believe are mentally ill by flunking them.

2. Autocratic schools could adopt subjective, vague standards for flunking students and then arbitrarily and capriciously flunk straight-A students under the color of academic legitimacy.

The conflicting standards for granting summary judgment held to and applied by this Court in *Ewing* discriminate against students by being more stringent than standards applied in disputes over scientific findings: A jury can decide scientific findings of fact where there is a "scintilla of evidence" but a jury can not find a student was flunked for non-academic reasons where there is a "scintilla of evidence" proving there was no academic, legitimate reason for flunking straight-A student.

All of the published cases similar to Friedemann's are negative, denying incompetent students their "day in court." Friedemann is a straight-A student who deserves his "day in court" to prove his competency.

CONCLUSION

Granting Friedemann Certiorari will provide heretical, cranky students throughout America, a positive hope that malicious, autocratic, incompetent teachers and staff will have to face a jury.

RESPECTFULLY SUBMITTED February 14, 2001 by,

Bruce A. Friedemann

Bruce A. Friedemann

APPENDIX

U.S. Court of Appeals for the Ninth Circuit
Filed Nov 17 2000

ORDER No. 99-17315

Before: FERGUSON, RYMER, and HAWKINS, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing. Judges Rymer and Hawkins vote to deny the petition for rehearing en banc, and Judge Ferguson so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App.P. 35

The petition for panel rehearing and the petition for rehearing en banc are denied. No further filings shall be accepted in this closed appeal.

U.S. Court of Appeals for the Ninth Circuit
Filed July 13 2000

MEMORANDUM No. 99-17315

Appeal from the United States District Court for the District of Arizona
John M. Roll, District Judge, Presiding
Submitted June 26, 2000
Before: FERGUSON, RYMER, and HAWKINS, Circuit Judges.

Bruce A. Friedemann appeals pro se the district court's summary judgment in favor of the defendants in his 42 U.S.C. § 1983 action alleging that he was improperly dismissed from a nursing program at Pima Community College. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a grant of summary judgment, *see Goehring v. Brophy,* 94 F.3d 1294, 1298 (9th Cir. 1996), and we affirm.

The district court properly granted summary judgment in favor of the defendants because the record does not compel the conclusion that the defendants acted arbitrarily in their academic decision. *See Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 225 (1985).

Friedemann concedes that he is not pursuing his 42 U.S.C §§ 1985, 1986 or ADA claims on appeal.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA (Tucson)

(CIVIL ORDER – GENERAL) CV-97-00289-JMR
Filed Sep 27 1999

On September 2, 1999, the Court granted Defendants' motion for summary judgment and dismissed this action. Thereafter, on September 21, 1999, Plaintiff filed a motion styled as "Plaintiff's Motion for a Rehearing – To Amend Summary Judgment." Plaintiff argues that the Court erred in granting Defendants' motion for summary judgment because "there is plenty of evidence for a jury to decide if there was a rational basis for flunking plaintiff and if the defendants exercised professional judgment when they flunked plaintiff."

Plaintiff fails, however, to offer any new evidence or argument regarding Defendants' motion. After reviewing Plaintiff's Motion for a Rehearing and the Court's September 2, 1999 order, the Court determines that it properly granted Defendants' motion for summary judgment. Plaintiff did not offer evidence from which a reasonable jury could conclude that Defendants acted in an unconstitutional manner.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for a Rehearing – To Amend Summary Judgment is **DENIED.**

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA (Tucson)

ORDER CV-97-00289-JMR
Filed Sept 7 1999

Pending before the Court is Defendants' Motion for Summary Judgment. For the reasons set forth below, Defendants' motion is granted.

BACKGROUND

Plaintiff was a nursing student at Pima Community College until he was disqualified from the Nursing Program

because he received a failing grade in Nursing 101. In 1996, Defendant Lupe Gutierrez, an instructor in the Nursing Program, recommended failing Plaintiff in his first semester. However, after consulting with Defendant Joan Gilbert, the Nursing Director, she reversed her decision and allowed Plaintiff to return for another semester.

During the new semester in Spring 1996, Defendant McCormick, Plaintiff's clinical instructor, failed him for submitting a substandard process recording (PR).[1] Although Plaintiff's first PR was allegedly substandard, Defendant McCormick gave Plaintiff the opportunity to resubmit it. She spent at least one hour with Plaintiff instructing him on improving the PR, and even provided him with her home phone number should he have any further questions. However, Defendant McCormick found the resubmitted PR to be unsatisfactory and gave Plaintiff a failing grade for Nursing 101.

On April 30, 1997, Plaintiff filed a complaint against various Defendants, including the Community College Board and the Nursing Board, Claiming that Defendants failed him because of his religious and political views. Plaintiff's Third Amended Complaint asserts that the Court has jurisdiction under 42 U.S.C. §§ 1983 (civil rights violation), 1985 (conspiracy), 1986 (failure to prevent conspiracy), 12132 (Americans with Disabilities Act), the First Amendment and the Fourteenth Amendment.

On July 20, 1998, defendants Community College Board and Nursing Board filed motions to dismiss, which the Court granted. On June 14, 1999, the remaining Defendants filed a motion for summary judgment. In his Response to Defen-

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1. The purpose of the process recording is to assist the student to effectively communicate and interact with patients. (Exhibit B, Defendants' Supplemental Separate Statement of Facts, at 3). The process recording should include the dialog between the student and the patient. (Id.). Then, the student is required to complete an analysis to determine which techniques were effective and haw the student could improve his techniques. (Id.). Process recordings are graded on a satisfactory or unsatisfactory basis. (Id.) Students are informed at the initial orientation that an unsatisfactory rating on one's process recording results in failure of he class. (Id.)

dants' Motion for Summary Judgment, Plaintiff concedes that his §§ 1985 and 1986 claims are properly dismissed.

ANALYSIS

Section 1983

To sustain a claim for relief under section 1983, Plaintiff must prove two elements: (1) Defendants acted under color of state law; and (2) Defendants deprived him of a right secured by the Constitution and laws of the United States. See Johnson v. Knowles, 113 F.3d 1114, 117 (9th Cir. 1997). In this case, Defendants assert that Plaintiff has failed to produce evidence which would demonstrate that plaintiff was deprived of a federally protected right.

"In cases involving academic dismissal, educational institutions have the right to receive summary judgment unless there is evidence from which a jury could conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance." Clements v. County of Nassau, 835 F.2d 1000, 1004 (2d Cir. 1987). Furthermore, the Supreme Court has stated that courts should "show great respect for the faculty's professional judgment" and should not "override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Regents of the Univ. Of Michigan v. Ewing, 474 U.S. 214, 224 (1985).

Defendant Gilbert, the Director of the Nursing Program during the time period relevant to this action, states in her affidavit that Plaintiff's PR "simply did not meet the criteria and was unsatisfactory." (Exhibit B, Defendants' Supplemental Statements of Facts, at 3). She also states that Plaintiff's PR "was equal to the worst process recording I have been called upon to review." (Id.) In addition to having been the Director of the Nursing Program, Defendant Gilbert possesses a Masters of Arts degree in education and psychiatric mental health nursing from New York University, where she is currently a Ph.D candidate. She has been in nursing education for over 30 years and has taught many nursing courses.

a. Rational Basis for Defendants' Decision

Plaintiff argues at length that a failure to return appropriate PRs should not result in failure of the entire class. He also argues that his unsatisfactory grade for his PR was motivated by his instructors' beliefs that his views on asthma and patient-nurse communication were unorthodox and unproductive. Plaintiff argues that "the jury can decide if the defendants and their therapeutic conversational technique are scientific" and notes that "Plaintiff studied linguistics ... and thus gleaned his own theories about effective conversation." (Plaintiff's Response to Defendant's Motion for Summary Judgment, at 6).

In sum, it is Plaintiff's contention that Defendants' techniques for treating and communicating with patients are unscientific, whereas he has developed the correct manner to treat and communicate with patients. Because of the correctness of his own theories, and the flaws of Defendants' views, Plaintiff apparently asserts that Defendants violated his constitutional rights be evaluating him pursuant to their criteria, instead of adopting his own.

Plaintiff asks the Court to do precisely what the deferential standard the Supreme Court articulated in Ewing prevents it from doing. Although Plaintiff offers excerpts from one book challenging the accepted views on treating asthma, he has failed to demonstrate that Defendants treatment methods were "a substantial departure from accepted academic norms." Ewing, 474 U.S. at 224. Rather, he implies that Defendants violated his constitutional rights by evaluating him by the accepted views of the medical community, rather than adopting his view that asthma is simply psychosomatic and his communication methods which he developed by studying linguistics.[2]

Federal courts are not the proper place to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require an expert evaluation of

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[2] Plaintiff fails to identify the nature of his alleged study of linguistics. He offers no evidence that he has received formal training in linguistics, or received any degree in the study of linguistics.

cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." Id. at 226 (citation omitted). Accordingly, Plaintiff has failed to show that a reasonable jury could find that there was not a rational basis for Defendants' decision.

b. Plaintiff's Allegations of Bad Faith

There is also no evidence that Defendants's evaluation of Plaintiff was motivated by bad faith. Although Plaintiff argues that there are several possible examples of bad faith, he fails to offer substantive evidence in support of his allegations. For example, Plaintiff states that he "instinctively knew Defendant McCormick was a "man-hater."" (Plaintiff's Response to Defendants' Motion for Summary Judgment, at 8). Plaintiff also implies the presence of gender discrimination by noting that the [sample] PR [in the syllabus] is "touchy-feely" and that "males aren't touchy-feely." Plaintiff fails to establish any basis upon which a jury could find that Defendants failed Plaintiff because of gender discrimination.

Plaintiff also seems to allege that Defendant Gutierrez was hostile towards him because of bad faith. The only evidence Plaintiff offers to support his assertions is his perception that Defendant Gutierrez was concerned with Plaintiff's attitude and treatment of elderly patients. However, Defendant Gutierrez's concerns with Plaintiff's attitude and treatment of patients do not manifest a bad faith attempt to harm Plaintiff's academic career. Moreover, there is no evidence that Defendant Gutierrez played any role in Plaintiff's failing grade. Therefore, Plaintiff has offered no evidence supporting his contention that defendants acted with bad faith.

ADA

To state a cause of action under the ADA, Plaintiff must allege:

> (1) he is a "qualified individual with a disability;" (2) he was either excluded from participation in or denied the benefits of a public entity's services, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits or discrimina-

tion was by reason of his disability. Weinreich v. Los Angles County Metro. Transp. Auth., 114 F.3d 876, 978 (9th Cir.), cert. denied, 118 S.Ct. 423 (1997).

Plaintiff's Third Amended Complaint asserts that various Defendants "neglected to comply with the Americans with Disabilities Act (42 USC 12132) when notified by plaintiff that he has difficulty communicating (i.e., plaintiff dislikes chatting)." (Third Amended Complaint, at ¶ 9). In its November 4, 1998 order, the Court determined that Plaintiff's dislike of chatting was not a disability. Therefore, Plaintiff's ADA claim is properly dismissed.

Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgment is **GRANTED** and this action is **DISMISSED** with **PREJUDICE.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Sanctions, filed July 29, 1999, is **DENIED**.

(2)

Supreme Court, U.S.
FILED

MAR 23 2001

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No. 00-1330

In The

Supreme Court of the United States

BRUCE A. FRIEDEMANN,

Petitioner,

v.

TERRI MCCORMICK, GUADALUPE GUTIERREZ, JOAN GILBERT, LUCY BRAJEVICH, KATHLEEN ASSAR, MICHAEL ENGS, JOE TORRO, MARGARET SPRAGUE, J. GRAHAM SMART, PIMA COMMUNITY COLLEGE DISTRICT BOARD OF GOVERNORS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Pima's[1] decision to academically fail Petitioner for his submission of a substandard nursing process recording[2] (hereinafter PR) arbitrary, capricious and without a rational basis.

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[1] All Respondents hereinafter referred to as "Pima."

[2] The purpose of the process recording is to assist the student to effectively communicate and interact with patients. Doc. 99 at 3, B-11. (Doc. refers to Ninth Circuit Docket Number.)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Course of Proceedings 1

C. Facts – Discrimination/Bias 3

1. Petitioner's Testimony 3

2. Pima's Testimony 6

D. Facts – Process Recordings 7

1. Petitioner's Testimony 7

2. Pima's Testimony 9

REASONS FOR DENYING THE WRIT 12

A. Judicial Review of an Academic Student Dismissal Is Limited to Whether the Decision Was Motivated by Ill-Will, Was Arbitrary and Capricious and Completely Unrelated to Academic Performance So as to Have No Rational Basis 12

B. Petitioner Has Not Presented Any Competent Evidence. All Of His Allegations Are Speculative And Conclusory – Not Factual, And Do Not Create A Fact Issue 17

C. Petitioner's ADA Claim is Spurious 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986) 18

Barnes v. Arden Mayfair, Inc., 759 F.2d 676 (9th Cir. 1985) 18

Board of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) 12

Carley v. Arizona Board of Regents, 153 Ariz. 461, 737 P.2d 1099 (Ariz.App. 1987) 16

Clements v. County of Nassau, 835 F.2d 1000 (2nd Cir. 1987) 13, 14, 15

Gupta v. New Britain General Hospital, 239 Conn. 574, 687 A.2d 111 (1996) 16, 19

Johnson v. Cuyahoga City Community College, 29 Ohio Misc.2d 33, 489 N.E.2d 1088 (1985) 16, 19

Morin v. School of Nursing, 34 Ohio App.3d 19, 516 N.E.2d 1257 (1986) 17, 19

Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) .. 12, 16

Rossomando v. Board of Regents of the Univ. of Nebraska, 2 F.Supp.2d 1223 (D.Neb. 1998) 20, 21

Soong v. University of Hawaii at Hilo, 72 Haw. 586, 825 P.2d 1060 (Haw. 1992) 19

Tobias v. Univ. of Texas, 824 S.W.2d 201 (Tex.App.-Fort Worth 1991) 17, 19

Van de Zilver v. Rutgers University, 971 F.Supp. 925 (D.N.J. 1997) 15, 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1983.....2, 13

42 U.S.C. § 1985.....2

42 U.S.C. § 1986.....2

42 U.S.C. § 12132.....2

U.S. Const. amend I.....2

U.S. Const. amend XIV.....2

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner enrolled in Nursing 101 at Pima Community College in 1996. His first semester clinical instructor, Lupe Gutierrez, recommended he be failed because she had serious concerns about his performance regarding several required learning objectives, including an assigned PR. Petitioner, Ms. Gutierrez and Joan Gilbert, the Nursing Director, met to discuss the failure. Although Ms. Gilbert agreed the PR was substandard, she recommended that Ms. Gutierrez not fail Petitioner and that she allow him to improve during the second clinical rotation. Her recommendation was followed.

During the second semester, Petitioner's clinical instructor was Terri McCormick. She failed him for submitting a second substandard PR after allowing it to be rewritten and spending extra time with him.

B. Course of Proceedings

On April 30, 1997, Petitioner filed a Complaint against various Defendants, including Pima Community College, his instructors and other individuals involved in Pima's internal appeal and review process.[3] He claimed he was failed because of his religious and political views and Pima's bias and prejudice. Petitioner's Third Amended Complaint was filed February 17, 1998, by order granting motion to amend dated February 12, 1998.

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[3] Petitioner's grade was changed to an "I" (incomplete) by Graham Smart, Pima's West Campus President.

Pima answered on May 28, 1998. Petitioner alleged violations under 42 U.S.C. §§ 1983 (civil rights violation), 1985 (conspiracy), 1986 (failure to prevent conspiracy), 12132 (Americans With Disability Act), and the First and Fourteenth Amendments to the U.S. Constitution.

On June 14, 1999, Pima filed a Motion for Summary Judgment. In his response to Pima's Motion for Summary Judgment, Petitioner conceded that his Sections 1985 and 1986 claims are properly dismissed.

On September 7, 1999, District Court Judge John Roll ordered Pima's Motion for Summary Judgment be granted and dismissed the action with prejudice. Judgment was entered September 7, 1999. On September 21, 1999, Petitioner filed a Motion for Reconsideration, which was denied by order of the court dated September 27, 1999. Notice of Appeal was filed on October 21, 1999.

By Memorandum Decision filed July 13, 2000, the Ninth Circuit affirmed, after *de novo* review, the District Court's grant of summary judgment. **Appendix to Petitioner's Writ**. The Court found the record did not compel the conclusion that the Defendants acted arbitrarily in their academic decision. ***Id***. Petitioner's request for full panel rehearing was denied on November 17, 2000. ***Id***.

Petitioner timely filed his Writ of Certiorari with this Court.

C. Facts – Discrimination/Bias

1. Petitioner's Testimony

Pima Defendants are evil, rotten, sick people, all of them. **Doc. 83 at 2, Exh. A-19**. They are goddamn ignorant and that is why I bring them before the bar. ***Id.*** My first clinical rotation was with Ms. Gutierrez. ***Id.*** **at 4**, A-24. Her behavior was pathetic. ***Id.*** I am pro-euthanasia. That is a "possibility" that had to do with the reason I was flunked. ***Id.***, A-25. McCormick's bias "could be" a lot of things, including her bias against men, someone who believes in euthanasia or she could be prejudiced because she has asthma or "maybe" her son does. ***Id.*** **at 5**, A-26. McCormick is divorced, "maybe" that means she doesn't like men or men don't like her or something. The basis of her euthanasia bias "may be" based on my published letter to the editor or "it could have been" because of something I said. ***Id.*** **at 6**, A-27. The main reason she was prejudiced is because she seems like the kind of person who has "asthmatic personality." ***Id.*** The reason I was flunked could have been a hundred things. ***Id.***, A-28. She could have had some malice for some reason I'm not fully aware of at the moment. ***Id.*** **at 7**, A-29.

McCormick could have heard conversations or had other knowledge from reading newspapers where my letters were published or something, though I don't know in fact whether she ever read a letter to the editor. ***Id.***

As to the allegations of religious bias or prejudice I might have discussed Jesus Christ during a lunch session. ***Id.*** **at 8**, A-29. I did not discuss religious beliefs with McCormick. ***Id.*** She "could have" seen me on cable TV. I

talk about St. Paul as the Antichrist and Jesus is the logos or the logic of God. I discuss a lot of things about money and how the Jews lied about the Holocaust. *Id.* I believe McCormick was aware of my religious beliefs but I don't know "as a matter of fact." *Id.*, A-30. There has to have been some psychological or other reason for her to flunk me. *Id.* She is not competent or she has no business flunking me so she must have been prejudiced. *Id.* She cannot flunk somebody for turning in a genius level superb PR unless there is malice, prejudice, bigotry, bias or some other reason for doing it. *Id.* I am "assuming" she had one of those reasons. *Id.*

The basis of the allegation against McCormick of age discrimination is because I am not young and fresh like some of the girls. *Id.* **at 9**, A-31. I have a jaded attitude. I am cynical and mean, ornery. Maybe she just thought I was too old. *Id.* There are no facts to support that speculation, "It is just something I'm speculating about." *Id.*

It is exactly true that I am "speculating" about the allegations of scientific, religious, political beliefs and gender and age as well as personality. *Id.* There is some reason she flunked me. "I can't put my finger on it, but it could be any one of those things." *Id.* She may not like my personality because I'm mean and ornery. I don't smile. I look bad. I have long hair. "It could be any of those things." "I'm certain it's something, but I don't know which one." *Id.*

As to Gilbert, Gutierrez and Brajevich, my testimony would be the same with respect to their dislike of my personality and beliefs as it was with McCormick. *Id.* **at 9-10**, A-31. There was ulterior motive. *Id.* **at 10**, A-31.

There is no specific fact or specific facts but there must have been something. *Id.*

As to McCormick, Gutierrez and Gilbert, it is exactly true that I can't put my finger on it but I know there was something. *Id.* **at 12,** A-36.

The other allegations against Brajevich is like all the rest of the Defendants. There has to be something hidden for some reason. I can't put my finger on it but it is there. *Id.*, A-37. It is "supposition" that the incident with Brajevich may have affected her input. *Id.*

As to Kathleen Assar, she went along with it. *Id.*, A-37. She did not want to offend the teachers or the Teachers' Union. It's obvious something is wrong. *Id.*, A-38. It is speculation that Kathleen Assar went along because she was one of the crew. *Id.*

Allegations of inappropriate administrative discrimination [separate from grade appeal] against Engs, Torro, Sprague and Smart. They all went along with the discrimination. They refused to reverse it. *Id.* **at 13,** A-30. I was being discriminated against for some reason not in the academic performance but for some ulterior motive and most likely it was because they thought I was mentally ill and incompetent. *Id.* There are no specific facts against Torro, Engs and Smart. Their motives were different. They did not want to rock the boat. *Id.* They "had to have" another reason. They should have ruled in my favor because it was obvious I was discriminated against. I am speculating with respect to Engs, Torro, Sprague and Smart that they didn't want to rock the boat. *Id.* Engs was not out to get me. He had no malice. *Id.*, A-39. He just

wanted to get on with his life and promotions. He is a good guy. *Id.*

The ADA claim is because I did not like chatting. *Id.* **at 14.** I did not request an accommodation for dislike of chatting. *Id.*, A-42. I am not mentally ill. I did not request an accommodation as a result of mental illness. Even if I was not mentally ill, they thought I was and should have accommodated me by being more tolerant and patient. *Id.*

As to McCormick, Gutierrez, Gilbert, Brajevich, Assar, Engs, Sprague, and Smart they all discriminated not because I can put a finger on a specific item or fact but because I know my PR was, if not genius level, certainly appropriate and above standard. *Id.* **at 14-15,** A-42. That being the case, there must have been some other reason for them to act and uphold the failing grade and declining the two appeals. *Id.* **at 15,** A-42.

Smart changed the failing grade to incomplete. *Id.*, A-43.

2. Pima's Testimony

Joan Gilbert has been a registered nurse since 1962. **Doc. 99, 2, Exh. B-9.** She has been in nursing education since 1996. *Id.* Throughout her nursing she participated in a clinical practice and performed a broad spectrum of nursing activities. *Id.* She has a Bachelor of Science degree, Master's of Arts degree in education and psychiatric mental health and is currently a Ph.D. candidate in higher education. *Id.* She has taught all areas of nursing, including medical, surgical, maternity, pediatrics, psychiatric, trends and issues, math and nutrition. *Id.* She was

Director of Nursing at Pima Community College from 1989 through 1997, thereafter being on faculty. *Id.* Her duties as Director were supervising and working with faculty, including Terri McCormick and delivery of the entire nursing program at Pima. *Id.*

Ms. Gilbert first met Bruce Friedemann in the Spring semester of 1996 with Lupe Gutierrez. *Id.*, B-10. Ms. Gutierrez had serious concerns regarding Mr. Friedemann's performance in his first clinical rotation of the semester regarding several required learning objectives, including an assigned PR. *Id.* Ms. Gutierrez was prepared to fail Mr. Friedemann because of the substandard performance, including the PR. Ms. Gilbert reviewed the recording and agreed it was substandard. *Id.* Ms. Gilbert recommended Ms. Gutierrez not fail Mr. Friedemann and allow him to improve during the second clinical rotation. *Id.* at 2-3, B-10. During her meeting with Mr. Friedemann, she observed he did not agree with any constructive suggestions. *Id.* at 3, B-10. He indicated the instructor was picking on him and was biased. *Id.*, B-10.

D. Facts – Process Recordings

1. Petitioner's Testimony

The PR related to the failure was in the clinical rotation with Ms. McCormick. **Doc. 83, 3, A-22.** There were two PRs. The superb PR was probably the second, which was better than the first. *Id.* A PR is a conversation with somebody you work with in the hospital or clinic, a patient. *Id.*, A-23. I really don't know the purpose. *Id.* I believe they used it to psychologically evaluate people and flunk people they did not like. *Id.* I think that's the

only purpose of it. The PR in the text was the silliest most stupid thing. *Id.* **at 4**, A-23. It was disgusting. Like a fifth grade girl talking to a baby. *Id.* Anybody could do better. I could do better with my eyes closed. It was ridiculous. *Id.* The reason McCormick flunked me was because of the PR content. *Id.* **at 6**, A-27. Someone in her family may have asthma and she was offended by the content of the PR. *Id.* My PR is superb. "It's genius level." *Id.* The people at Pima are nuts, ignorant, irrational, obstinate, ignorant. *Id.* You name the reason I was flunked. There could have been a hundred things. *Id.*, A-28. McCormick "must have" been prejudiced. *Id.* **at 8**, A-30. She can't flunk somebody for turning in a genius level superb PR unless there is malice, prejudice, bigotry, bias or some other reason for doing it. *Id.* I am assuming she had one of those reasons. *Id.*

No one reviewed the PRs to determine whether they are genius level or even above standard. *Id.* It is self-evident and obvious. *Id.* I did not have any other person in the health care profession, nurse or doctor, review the PRs for an opinion. *Id.* It is accurate that I have not had any medically trained person review the PRs. *Id.*

My first clinical rotation was with Guadalupe Gutierrez. *Id.* **at 11**, A-34. I had a problem with her regarding the PR. *Id.* She was not satisfied with the PR. It barely squeaked by. *Id.*, A-35. She recommended I fail. The two of us went to Joan Gilbert, who suggested I be given another chance to continue the program. *Id.*

I had my own ideas about what a PR should be. *Id.* **at 13-14**, A-40. My ideas were better than those in the book. *Id.*

2. Pima's Testimony

I (**Joan Gilbert**), Nursing Director, had a second meeting with Mr. Friedemann and Terri McCormick on May 16, 1996, to discuss his failing grade. **Doc. 99, 3, B-11.** I reviewed Mr. Friedemann's rewritten PR, which did not meet criteria and was unsatisfactory. ***Id.*** There was no accountability or responsibility on Mr. Friedemann's part regarding his performance. ***Id.*** His position was, "We did this to him." He was unwilling to hear what we had to say. He yanked pages out of Ms. McCormick's hand, cursed and said, "I'll see you in court." ***Id.***

In over 30 years of nursing practice and teaching I have evaluated over 1,000 PRs. ***Id.*** The purpose of the PR is to assist the student to effectively communicate and interact with patients. ***Id.*** The student is not to use the PR to diagnose a patient's problems. ***Id.*** The PR is to learn effective communication skills. ***Id.***

Mr. Friedemann's rewritten PR for Terri McCormick was equal to the worst PR I have been called upon to review. ***Id.*** Mr. Friedemann was unable to critique his nurse/patient interaction. ***Id.*** He could not or would not analyze his communication process. ***Id.*** Part of the PR requires the student to complete an analysis and evaluation to determine what techniques were helpful and what techniques were not and what he should do differently. Mr. Friedemann had difficulty with this assignment. ***Id.*** Terri McCormick and I evaluated the PR based upon our education, experience, skill, and training as nurses and nursing instructors. ***Id.*** **at 4**, B-12. My opinion and Ms.

McCormick's opinion that the PR was substandard was based upon our professional judgment and did not arise from any prejudice or animosity toward Mr. Friedemann. *Id.*

Mr. Friedemann complains the PR should have been reviewed by a psychiatrist. *Id.* I am not a psychiatrist but I have a background in psychiatric nursing as well as a Master's degree in nursing with a specialty in the area of psychiatric/mental health. *Id.* I have been with a teaching faculty in the psychiatric nursing area at Pima College for the last two years. *Id.* I have personally graded PRs for students in my assigned clinical lab. *Id.*

The PR is graded on a satisfactory or unsatisfactory basis. *Id.* If a student receives an unsatisfactory, he or she fails the clinical rotation and the course. *Id.* Students are informed of this during the initial class orientation. *Id.* It is my observation that students are well aware of this policy. *Id.* A nursing student may receive "A"s in all other aspects of the nursing course, receive an unsatisfactory on the PR, fail the clinical rotation and the entire course. *Id.* That was the grading policy at Pima during my tenure as Director of Nursing and was applicable to Mr. Friedemann. *Id.*

It is unusual for a student to fail the nursing course because of a substandard PR. *Id.* **at 5,** B-13. I can recall other students, not first year, who failed the course because of either a substandard PR or a substandard care plan. *Id.* The failure of Mr. Friedemann was justified by the inadequate and substandard PR. *Id.*

Mr. Friedemann was aware that a second satisfactory PR was required during the second clinical rotation. *Id.* **at**

6, B-16. A third meeting with Mr. Friedemann occurred with Terri McCormick to discuss the unsatisfactory clinical evaluation he received. *Id.* A primary basis for the unsatisfactory evaluation was an unacceptable PR which the student submitted at the last possible moment. *Id.* The instructor and I presented many areas of concerns including giving information, giving opinions, making broad generalizations, intellectualizing and an inability to self-evaluate the therapeutic evaluation. *Id.* After a lengthy discussion Mr. Friedemann stated, "This is all silly, stupid, and irrational. I'm just getting the ___ out of here . . . I'll see you in court." *Id.*

Terri McCormick has been a registered nurse since 1987. **Doc. 99 at 6, C-18**. Bruce Friedemann, a student in Nursing 101 at Pima College, entered my second clinical rotation at Northwest Hospital in March or April 1996. During the rotation, I observed Mr. Friedemann needed to improve his communication skills with patients. *Id.* I began to spend more time with Mr. Friedemann than the other students because I felt he needed more instructional supervision and guidance. *Id.* **at 7**, C-18. The students were required to write a second PR in my rotation. *Id.* I graded Mr. Friedemann's second PR and found it to be unsatisfactory. *Id.*, C-19. I spent approximately one hour after class with Mr. Friedemann discussing his unsatisfactory PR. *Id.* I explained the objectives of the PR and why his was unsatisfactory. I told him I would give him the opportunity to rewrite the PR. *Id.* He stated he understood what to do. I gave him my home telephone number so he could call me if he had further questions. *Id.* He never called me. *Id.*

Mr. Friedemann handed me his rewritten PR at the restaurant where the class was having lunch on the last day of school. *Id.* I graded the PR as soon as I got home. I found the rewritten PR to be unsatisfactory. *Id.* I spoke with my co-instructors, Kay Baker and Lupe Gutierrez, to discuss my decision for an unsatisfactory grade. I called Mr. Friedemann to let him know the rewritten PR was unsatisfactory and he would receive a failing grade. *Id.*

I evaluated and graded Mr. Friedemann's two PRs based upon my education, training, professional judgment, experience and skill as a nurse and nursing instructor. *Id.* I told the students if they did not pass any portion of the clinical rotation they would fail the entire course. *Id.* High emphasis is placed on these assignments. *Id.* at 20, C-19.

REASONS FOR DENYING THE WRIT

A. Judicial Review of an Academic Student Dismissal Is Limited to Whether the Decision Was Motivated by Ill-Will, Was Arbitrary and Capricious and Completely Unrelated to Academic Performance So as to Have No Rational Basis.

The principles for determination and review of academic decisions have been established by the United States Supreme Court in ***Regents of the Univ. of Michigan v. Ewing***, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) and ***Board of Curators of Univ. of Missouri v. Horowitz***, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). The principles set forth in these cases are dispositive of Petitioner's claim.

Clements v. County of Nassau, 835 F.2d 1000 (2nd Cir. 1987), is factually similar and dispositive. A grant of summary judgment for the college was upheld on appeal. Plaintiff, a nursing student, failed the clinical component of the course and automatically earned an F for the entire course. She alleged defendants were motivated by personal animus and ill-will rather than a legitimate assessment of her academic performance and that defendants acted in concert to force her out of the nursing program. The Court first noted the propriety of summary judgment in cases of judicial review of grading procedures:

> Allegations of improper conduct levelled against teachers in our university systems call into play fundamental questions of fairness. At times, however, they threaten to strike at the heart of institutions of higher learning. As Robert Maynard Hutchins once cautioned, "Freedom of inquiry, freedom of discussion, and freedom of teaching – without these a university cannot exist." This is particularly true where the charges are aimed at the core of a teacher's authority, the student's grade. In such cases of academic dismissals, summary judgment, when properly employed, can serve the laudable function of protecting our crucibles of knowledge from the vagaries of the judicial system. 835 F.2d at 1001.

As does Petitioner, *Clements* complained under 42 U.S.C. § 1983. The Court noted where the record could not lead a rational trier of facts to find for the non-moving party there is no "genuine issue for trial." *Id.* at 1004. Specifically:

> In cases involving academic dismissal, educational **institutions have the right to receive**

> **summary judgment unless there is evidence from which a jury could conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill-will unrelated to academic performance.** *Ikpeazu v. University of Nebraska*, 775 F.2d 250, 253 (8th Cir. 1985) (per curiam). The legal standard in challenging an academic expulsion is necessarily a higher one than for disciplinary dismissals because, as the Court explained in refusing to require colleges to provide hearings, the determination is more subjective and evaluative than the factual questions present in most disciplinary decisions. *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 90, 98 S.Ct. 948, 955, 55 L.Ed.2d 124 (1978). Recently, in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985), the Court expanded upon this stance of judicial deference. When courts review the substance of academic decisions, it stated, they should show great respect for the teacher's professional judgment. Specifically, the **Court held that courts may not overturn such decisions "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."** *Ewing*, 474 U.S. at 225, 106 S.Ct. at 513. *Id.* at 1004-05 (emphasis added).

The Court noted plaintiff's version was based upon her "conclusory statements." *Id.* at 1005. The Court rejected plaintiff's claim of personal animosity of the teachers as creating a factual issue. "The state of mind exception, however, is appropriate only where solid, circumstantial evidence exists to prove plaintiffs' case." *Id.* Petitioner

admits his allegations are based on his personal speculation. Clements asserted that the faculty "must have resented" her appeals. That is similar to Petitioner's argument that there "must have been" bias, prejudice and discrimination. The ***Clements*** Court noted, just as here, "There is no indication of any such hostility in the record." 835 F.2d at 1005. Acknowledging there was some "slight circumstantial evidence" the Court found:

> It does not reveal any material fact in dispute from which a reasonable jury could conclude that her failing grade was such a substantial departure from accepted academic norms as to demonstrate that the teacher did not exercise professional judgment. **Where, as here, the circumstantial evidence is so minimal and the legal standard of proof so daunting, summary judgment is appropriate even when state of mind is at issue.** *Id.* at 1006 (emphasis added).

See ***Van de Zilver v. Rutgers University***, 971 F.Supp. 925, 931 (D.N.J. 1997). In ***Van de Zilver***, plaintiff student's motion for summary judgment was denied. Rutgers' motion for summary judgment was granted. The Court upheld the University's decision not to admit a student to its medical school based upon faculty evaluation of the student's academic record and other "non-cognitive factors not easily assessed from transcripts." The Judge would not override the professional judgment of the faculty. 971 F.Supp. at 928.

In *Van de Zilver, supra*, 971 F.Supp. at 934, the Court relied upon the United States Supreme Court admonitions that:

> If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions – decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making. *Ewing*, 474 U.S. at 226, 106 S.Ct. at 514 (internal citations omitted). 971 F.Supp. at 934.

The Court found the standard of review to be "very narrow." ***Id.*** Again referring to plaintiff's burden, the Court stated:

> Plaintiff has failed to come forth with any evidence whatsoever that the decision to terminate him from the Joint Program was the product of bad faith or ill will. ***Id.***

See also: ***Carley v. Arizona Board of Regents***, 153 Ariz. 461, 737 P.2d 1099, 1102-03 (Ariz.App. 1987) (***Ewing*** adopted – discretion to determine, on academic grounds, who may be admitted to study, has been described as one of the four essential freedoms of a university); ***Gupta v. New Britain General Hospital***, 239 Conn. 574, 594-96, 687 A.2d 111 (1996) (judicial circumspection is particularly warranted in the context of academic decisions concerning medical competency); ***Johnson v. Cuyahoga City Community College***, 29 Ohio Misc.2d 33, 34, 489 N.E.2d 1088 (1985) (in the grading procedure or system, educators are uniquely qualified in their field and they depend

upon a certain degree of autonomy for the smooth operation of educational institutions – like the appraisal of artwork, or the appreciation of music, grading determinations are essentially subjective and evaluative, lacking firm rules or guidelines or purely empirical data); ***Morin v. School of Nursing***, 34 Ohio App.3d 19, 22, 516 N.E.2d 1257 (1986) (university faculties must have the widest range of discretion in making judgments concerning academic performance of their students and their entitlement to promotion or graduation); ***Tobias v. Univ. of Texas***, 824 S.W.2d 201, 208-211 (Tex.App.-Fort Worth 1991) (decision of individual professor as to proper grade for a student in a particular course requires an expert evaluation of cumulative information and is not really adapted to the tools of judicial decision making – narrow avenue for judicial review, court must review the record for some evidence that professional judgment was exercised and if any evidence exists that there was some rational academic basis for the complained of decision, the substantive due process inquiry ceases).

Summary judgment for Pima was not only proper but mandated by Petitioner's complete inability to marshal facts in his support and upon the foregoing legal principles of academic decision making.

B. Petitioner Has Not Presented Any Competent Evidence. All Of His Allegations Are Speculative And Conclusory – Not Factual, And Do Not Create A Fact Issue.

Petitioner alleges his failure by Ms. McCormick was based upon bias and prejudice against him including his

political and religious beliefs, personality and looks. He admits he has no facts to support his beliefs and is merely speculating. **Doc. 83 at 8, 9, 10, 12, 13, 14-15.**

"[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." ***Anderson v. Liberty Lobby, Inc.***, 106 S. Ct. 2505, 2511 (1986). A party opposing summary judgment is entitled to the benefit of only **reasonable** inferences that may be drawn from the evidence put forth. ***Barnes v. Arden Mayfair, Inc.***, 759 F.2d 676, 680 (9th Cir. 1985).

Petitioner also alleges Pima maliciously discriminated against him. Yet, he admits in deposition that his allegations of discrimination and malice are founded on nothing more than his speculation because he knows his PR was "superb". **Doc. 83 at 6, 8, 14, 15.**

These are not "facts" or "competent evidence" creating an issue for a fact finder.

Finally, Petitioner argues that Pima's acts, particularly those of McCormick, were a substantial departure from accepted academic norms. He does not provide testimony or evidence of what the normal and accepted academic standards are from which Pima departed. No health care witness reviewed the PRs. **Doc. 83 at 8.**

Summary judgment proceedings are not a substitute for jury trials. However, a motion for summary judgment should be granted if the opposition to the motion has so little probative value, given the quantum of evidence

required, that reasonable people could not agree with the conclusion advanced by the proponent of the opposition to the motion.

See also factually similar medical and student cases upholding defense summary judgments: ***Gupta v. New Britain General Hospital***, 239 Conn. 574, 687 A.2d 111 (1996) (physician discharged – merely alluding to facts does not establish them); ***Tobias v. Univ. of Texas***, 824 S.W.2d 201 (Tex.App.-Fort Worth 1991) (nursing student failed for not submitting nursing process after being warned); ***Morin v. School of Nursing***, 34 Ohio App.3d 19, 516 N.E.2d 1257 (1986) (nursing student dismissed after being advised of deficiencies – not arbitrary and capricious); ***Johnson v. Cuyahoga City Community College***, 29 Ohio Misc.2d 33, 489 N.E.2d 1088 (1985) (nursing student has burden of showing exam arbitrarily and capriciously graded); ***Soong v. University of Hawaii at Hilo***, 72 Haw. 586, 825 P.2d 1060 (Haw. 1992) (nursing student allegedly forced to withdraw from program for non-academic reasons – § 1983 claim dismissed, no constitutionally protected right to continued enrollment).

C. Petitioner's ADA Claim is Spurious.

Petitioner alleges an ADA violation. He claims Defendants Gilbert, McCormick and Brajevich failed to comply with the ADA when Petitioner notified them he had a difficulty communicating, "i.e., plaintiff dislikes chatting." **Doc. 83, 14**. His disability was that he did not like talking with people. ***Id.*** Petitioner did not request an accommodation for his dislike of chatting. ***Id.*** Although he is not mentally ill, they thought he was and they

should have accommodated him for mental illness. *Id.* They should have been more tolerant and patient. *Id.* Petitioner did not request an accommodation as a result of mental illness. *Id.*

In ***Rossomando v. Board of Regents of the University of Nebraska***, 2 F.Supp.2d 1223 (D.Neb. 1998), Plaintiff alleged that defendants knew of her "depth perception condition" and made no reasonable accommodation for the disability thereby violating her rights under the ADA. The Court found:

> [A]n academic institution can be expected to respond only to what is known (or is chargeable with knowing). *Wynne v. Tufts University School of Medicine*, 976 F.2d 791, 795 (1st Cir. 1992) (granting summary judgment for the medical school on a medical student's Rehabilitation Act claim that school failed to reasonably accommodate his vision problems when the student made no claim of vision problems until after the school dismissed him), *cert. denied*, 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 470 (1993). Thus, "to be liable under the Rehabilitation Act, [it] must know or be reasonably expected to know of [a student's handicap]." *Id.* (quoting *Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1381 (3rd Cir. 1991)). Therefore, a "relevant aspect of this inquiry is whether the student ever put the medical school on notice of his handicap by making 'a sufficiently direct and specific request for special accommodations.' " *Id.* (quoting *Nathanson*). The same is true under the ADA. *See, e.g., Tips v. Regents of Texas Tech University*, 921 F.Supp. 1515, 1518 (N.D. Tex. 1996) (holding that the plaintiff failed to establish a prima facie case because the post-graduate

> student did not make her learning disability known to the school) (quoting legislative history and regulations for ADA). *Id.* at 1230 (footnote omitted).

Finding plaintiff had not informed the school of any alleged disability the Court held:

> In summary, on this record, no reasonable jury could return a verdict for the plaintiff regarding her disability claim. In particular, we cannot fault the defendants for failing to accommodate the plaintiff's visual/tactile problems when she did not tell the defendants about those problems or request an accommodation for them. *Id.*

Petitioner's ADA claim is spurious. Summary judgment was mandated.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 00-1330

In The
Supreme Court of the United States

Bruce A. Friedemann, *Petitioner*

v.

Terri McCormick, Guadalupe Gutierrez, Joan Gilbert, Lucy Brajevich, Kathleen Assar, Michael Engs, Joe Torro, Margret Sprague, J. Grahm Smart, Pima Community College District Board of Governors, *Respondents.*

On Petition for a Writ of Certiorari to the 9th Circuit Court of Appeals

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REPLY TO BRIEF IN OPPOSITION

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5 pp

CORRECTIONS & CLARIFICATIONS

Pages 3-6 of Pima's "Opposition" consists of statements made by Friedemann at a hostile deposition attended by Defendants McCormick, the teacher who flunked Friedemann and Smart, the President to Pima College.

On Page 11 McCormick alleges that she spent "approximately one hour after class with Mr. Friedemann discussing his unsatisfactory PR." She actually spent less than 10 minutes discussing the PR with Friedemann. Also on Page 11, the word left blank is "Hell."

On Pages 3 and 19-21, Pima brings up an Americans with Disabilities Act (ADA) claim that Friedemann did not raise in the 9th Circuit Court and is not an issue herein.

THE QUESTION PRESENTED BY PIMA IS INCOMPLETE

The Question presented by Pima (Page 1) omits significant issues. Pima's Question, property phrased should read:

Did the Trial Court err by not allowing a jury to determine if Pima's decision to academically fail Petitioner was:

1. arbitrary and capricious;
2. motivated by bad faith and ill will;
3. unrelated to academic performance;
4. irrational (no rational basis);
5. a substantial departure from accepted academic norms;
6. because the persons or committee responsible for the flunking did not actually exercise professional judgment (teacher/staff incompetence)?

THE CASES CITED BY PIMA ARE DISSIMILAR

In Pima's "Reasons for Denying the Writ" (Page 12), Pima cites several cases that are dissimilar. Two and a half pages (pp. 13-15) are devoted to *Clements v. County of Nassau,* 835 F.2d 1000 (2nd Cir. 1987) and one page (15-16) is devoted to *Van de Zilver v. Rutgers University,* 971 F.Supp. 925 (D.N.J 1997).

Clements *continuously* exhibited unsafe, unclean, non-antiseptic techniques that caused a physical danger to her patients! She never contested that her techniques were unsafe, she contested the necessity of having to repeat the course and that it was unfair to fail her within the first two days of her clinical rotation. Clements was also given more opportunities to pass than Friedemann was. (The academic norm is to allow students more than two chances to receive a passing grade.) Clements failed empirical tests and was told to "use common sense." The test (PR) Friedemann failed was subjective and vague. Friedemann has a massive amount of proof that his test (PR) was "satisfactory" (see below) and Friedemann continuously and vigorously challenged the teachers and staff's irrational, inadequate and unprofessional evaluation of the PR.

Van de Zilver "had fallen far short of the academic criterion stated in the Handbook." He failed to achieve an "honors" or "high pass" in any of his courses taken at the medical school and he received a large number of "C's" in his Rutgers courses. "His grades were consistently poor throughout his four semesters in the Joint Program and were not a temporary aberration." He failed to participate in programs or take opportunities to improve his grades. Friedemann was an "A" student.

In the other cases cited by Pima: Gupta, Tobias, Morin and Johnson exhibited similar unsafe practices, poor grades and incomplete work.

In all the published cases related to Friedemann's, none of them are similar and all of them are negative: academically poor students were denied their "day in Court" — none of the published cases are positive: granting an academically gifted student his "day in Court."

THERE IS A MASSIVE AMOUNT OF COMPETENT, FACTUAL EVIDENCE FOR A JURY TO EVALUATE

Pima alleges that Friedemann did not present any competent, factual evidence (p. 17).

Friedemann's PR is *prima facie* evidence that there was no academic reason for flunking. A jury can:

1. Compare Friedemann's PR to the sample PR's in the school syllabi (the academic norms) and see that Friedemann's PR is *far* better.
2. See that Defendant McCormick offered no legitimate criticism of the PR. (The teacher critiques and grades the PR's by making comments and the grade directly on the PR.)
3. Compare Friedemann's PR to the professional report written by a nurse in a peer-reviewed journal and see that Friedemann's PR and the nurse's report are almost exactly the same. (The nurse's report appeared *after* Friedemann wrote his and was included at D92-TCYOAB.)
4. Compare the science in Friedemann's PR to the massive amount of corroborating evidence in "The Cure Yourself of Asthma Book" [D92-TCYOAB].

Further, irrefuted evidence (from Friedemann's Petition) proves Pima's decision to flunk Friedemann was arbitrary and capricious; motivated by bad faith and ill will; unrelated to academic performance; irrational; a substantial departure from accepted academic norms; because the teachers and staff were incompetent:

1. Friedemann is the only student *in ten years* who flunked NRS 101 because of an "unsatisfactory" PR.
2. Defendants McCormick, Gilbert and Gutierrez thought Friedemann was mentally ill.
3. McCormick and Gilbert were afraid of Friedemann.
4. Students hated Friedemann.
5. On three separate occasions, Defendants Assar, Gilbert and McCormick called the cops of Friedemann but they did not "press charges" or initiate disciplinary proceedings.
6. Friedemann disliked Defendants McCormick, Gutierrez, Gilbert and Brajevich *and they knew he disliked them.*
7. If not for the PR, Friedemann would have received a B for NRS 101.
8. The subjectively graded PR allows for arbitrary and capricious flunking of students the faculty dislikes.

CONCLUSION

There is a massive amount of evidence for a jury to find there was no academic reason for flunking Friedemann. Therefore, Friedemann petitions this Court to grant Certiorari.

Respectfully submitted,

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March 30, 2001